

DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

10,070

FILE: B-192221

DATE: May 9, 1979

MATTER OF: J. Baranello and Sons

*[Protest Alleging Failure of Awardee to Comply With Definitive  
Responsibility Criteria of Solicitation]*

DIGEST:

1. General Accounting Office (GAO) will not consider issues raised in bid protests where same issues are before court of competent jurisdiction except where Court expresses interest in GAO proceedings and defers ruling on merits for purpose of allowing GAO to exercise its expertise as an aid to Court.
2. Responsibility is term of art employed in federal procurement and refers to proposed contractor's ability or "capacity" to perform all contract requirements, while responsiveness of a bid concerns whether bidder has unequivocally offered to provide requested items or service in total conformance with terms of invitation for bid. Question of application of regulation requiring bids to materially conform to specifications of invitation for bids is matter of responsiveness.
3. Issuance of Certificate of Competency (COC) by Small Business Administration will overcome special experience requirements (definitive responsibility criteria) specified in solicitation as COC is conclusive on contracting officers by law, and where record shows SEA fully considered definitive responsibility criteria in determining to issue COC GAO would not recommend SEA reconsider decision.

005200

DLG 01521

J. Baranello and Sons (Baranello) protests the award of a contract to PJR Construction Corporation (PJR) under invitation for bids (IFB) No. INY74005 issued by the General Services Administration (GSA) for the repair and improvement of the Federal Building in New York City. Baranello contends that Allied Elevator (Allied), the subcontractor which PJR proposed for the performance of the elevator work, did not meet the experience requirements of the "Competency of Bidder" clause of the IFB. DLG 01522

The gravamen of the protest is the authority of the Small Business Administration (SBA) to issue a Certificate of Competency (COC) to PJR in the face of what Baranello perceives as PJR's failure to comply with definitive responsibility criteria set forth in the solicitation.

As a preliminary matter we point out that the issue in this case is presently before the United States District Court for the Southern District of New York in Civil Action No. 79-595. As a general rule GAO will not consider issues raised in a bid protest where the same issues are before a court of competent jurisdiction. Alton Iron Works, Inc., B-191899, August 30, 1978, 78-2 CPD 156. However, where as here, the Court expresses an interest in the GAO proceedings, particularly where the Court by order defers ruling on the merits for the purpose of allowing GAO to exercise its expertise as an aid to the Court, we will issue a decision on the merits. 53 Comp. Gen. 522 (1974), 74-1 CPD 44; 52 Comp. Gen. 706 (1973).

The material facts in this case are not in dispute. Bids were opened on June 8, 1978, with eight bids having been received ranging from PJR's low bid of \$13,447,000 to \$15,972,000. Baranello was the second low bidder at \$13,449,700.

The solicitation contained the following provision:

"13. COMPETENCY OF BIDDER (ELEVATOR)

"13.1 The bidder, or the subcontractor whom the bidder will use for performance of the elevator work, shall have had at least three years' successful experience in installing and servicing elevators.

"13.2. In addition, the bidder or the subcontractor shall have installed, on at least two prior projects, elevators which are comparable to those required for this project and which have performed satisfactorily under conditions of normal use for a period of not less than one year. To be considered comparable, prior installation shall have not less than the same number of elevators operating together in one group as the largest number in any group specified for this project, except that a group of four may be considered comparable to a larger group specified for this project.

"13.3 A list of the prior comparable installations by the bidder or by the subcontractor \* \* \* shall be submitted promptly upon request of the Government.

"13.4 The names, addresses, experience, and a statement of the work to be performed by each subcontractor or second-tier subcontractor whom the bidder or the principal subcontractor, as the case may be, will use for performance of minor portions of the installation of elevators, shall also be submitted promptly upon request by the Government."

The IFB also required bidders to submit with their bids the names of the individuals or firms proposed to perform various categories of work by subcontract. Pursuant to that requirement, PJR listed Allied Elevator (Allied) as its proposed subcontractor for 100% of the elevator work required by the specifications while Baranello listed Otis Elevator Company (Otis) as its proposed elevator subcontractor.

By letter of June 9, 1978, Baranello informed GSA of its belief that Allied did not qualify under the "Competency of Bidder" clause, and on June 22, 1978, PJR protested award to any other bidder on the ground that it was the lowest responsive and responsible bidder.

On June 28, 1978, Allied provided the contracting officer with information which it believed indicated that it met the IFB's experience requirements. That letter listed prior elevator installations, the firm's experience and the experience and "know-how" of the firm's principals and employees.

On July 10, 1978, the contracting officer informed PJR that Allied did not meet the requirements of the "Competency of Bidder" clause and instructed PJR to propose a substitute subcontractor. However, the contracting officer's determination in this instance did not consider the experience of Allied's employees, but was based only on the finding that Allied had not previously installed elevator banks of four or more. It was the decision to consider a subcontractor substitution, that was the basis for Baranello's initial protest.

Thereafter, the contracting officer conducted an extensive investigation of the competency of Allied's employees, and in a letter of October 11, 1978, GSA notified GAO of a second negative determination of Allied's qualifications. That letter also advised that the question of PJR's responsibility was being referred to the Regional Director of the Small Business Administration (SBA) pursuant to the Small Business Act, 15 U.S.C. § 637(b)(7) (1976), as amended by Act of August 4, 1977, Pub. L. No. 95-89, § 501 and the Federal Procurement Regulations (FPR) § 1-1.708.2 (1964 ed.). That referral requested SBA to consider whether Allied had the requisite 4-bank installation experience required by subparagraph 13.2 of the "Competency of Bidder" clause.

After thoroughly reviewing Allied's business history and technical competency, SBA found that:

"Allied has not installed more than 3 elevators in a single bank in any past job."

SBA thereafter concluded that:

"\* \* \* Although Allied's past experience does not qualify the firm in accordance with the Competency of Bidder clause, it must certainly be considered in any evaluation of the firm's technical capability to perform on this procurement. Discussions with several experts in the field of elevator installation revealed that the basic installation of a bank of 4 elevators is extremely similar to the installation of a bank of 2 or three elevators. The difference lies in the complexity of the control system \* \* \*.

"In order to gain the additional management level experience in the installation of a bank of 4 elevators and to comply with the requirements of this installation, Allied has retained \* \* \* a consultant \* \* \* [who] is considered thoroughly competent to install elevators in banks of 4 or more \* \* \*.

"[Allied's personnel] \* \* \* have had long and diversified experience in the installation and repair of elevators similar to those required by this solicitation. The following summaries are intended to demonstrate that the listed personnel meet the specific requirements of the Competency of Bidder clause and do not represent a complete review of the experience of each man \* \* \*."

Thereafter, SBA recommended issuance of a Certificate of Competency. This recommendation was based on the following premises, among others:

"A. Allied and PJR have demonstrated the technical capability to perform on this procurement. The firm has retained a management level consultant with extensive experience in the installation of banks of 4 elevators and over.

"B. A review of the past experience of all primary employees that will be used to install the elevators on this job revealed that each individual meets the requirements of the Competency of Bidder clause contained in Section 0100, Special Conditions, paragraph 13."

GSA appealed the recommendation to the Assistant Administrator for Procurement and Management Assistance of SBA pursuant to 13 C.F.R. 124.8-16(c) (1978). In that appeal, GSA submitted extensive comments to SBA in opposition to issuance of a COC. For example, in a letter dated December 15, 1978, the contracting officer contended that SBA unilaterally determined that the installation of a bank of 2 elevators is comparable to installation of a bank of 4, resulting in a modification of specific IFB criteria prejudicial to other bidders and prospective bidders. The letter urged that issuance of a COC to PJR, using Allied as the elevator subcontractor, would exceed SBA's authority to determine responsibility under Section 8(b) of the Small Business Act, and would undermine the workmanship and safety required by the project. Nonetheless on December 28, 1978, the SBA issued a COC certifying PJR to be a responsible contractor as to capacity and credit.

On January 5, 1979, Baranello protested to GAO asserting that the COC was not conclusive on GAO and that award to PJR would be prejudicial to Baranello.

#### Discussion

"Responsibility" is a term of art employed in federal procurement and refers to a proposed contractor's apparent "ability" or "capacity" to perform all of the

contract's requirements within the limitations prescribed in the solicitation, see National Technical Services, Inc., B-191096, Feb. 16, 1978, 78-1 CPD 138; Empire Manufacturing Company, Incorporated, B-180433, February 8, 1974, 74-1 CPD 60, and a contracting officer may not award a federal contract unless he is able to determine that the prospective contractor is "responsible." FPR § 1-1.1204-1 (1964 ed.). FPR § 1-1.1203 sets forth various standards which a prospective contractor must meet prior to being found responsible and included therein is the following provision:

"When the situation warrants, contracting officers shall develop \* \* \* special standards of responsibility to be applicable to a particular procurement or class of procurements. Such special standards may be particularly desirable where a history of unsatisfactory performance has demonstrated the need for insuring the existence of unusual expertise or specialized facilities necessary for adequate contract performance. The resulting standards shall form a part of the solicitation and shall be applicable to all bidders or offerors."  
FPR § 1-1.1203-3.

To the extent these "special standards" involve specific and objective responsibility criteria they have been characterized as "definitive responsibility criteria" compliance with which is a necessary prerequisite to award, i.e., they cannot be waived by the contracting officer. See Data Test Corporation, 54 Comp. Gen. 499 (1974), 74-2 CPD 365; Oceanside Mortuary, B-186204, July 23, 1976, 76-2 CPD 74.

"Compliance," however, does not necessarily mean literal compliance with the specific letter of such definitive criteria, as a bidder may be able to demonstrate experience equivalent to that specified in the solicitation through the experience of its officers and employees. See Haughton Elevator Division Reliance Electric Corporation, 55 Comp. Gen. 1051 (1976), 76-1 CPD 294. In this respect, we believe that the experience requirements set forth in the "Competency of Bidder" clause should be regarded as "definitive responsibility criteria," and we

have so regarded them on prior occasions where the same or substantially similar provisions have been included in the solicitation. E.g., George Hyman Construction Company of Georgia, B-186279, November 11, 1976, 76-2 CPD 401.

On the other hand, the concept of the responsiveness of a bid concerns whether a bidder has unequivocally offered to provide the requested items in total conformance with the terms and specifications of the invitation. This determination must be made from the bid documents as of the time of opening. Lift Power Inc., B-182604, January 10, 1975, 75-1 CPD 13. A bid which takes no exception to the requirements of the invitation is responsive, i.e., it complies with all material requirements of the invitation. FPR § 1-2.301. In other words, where the bidder has promised to deliver exactly what was called for in the invitation, within the time periods specified, and in accordance with the terms and conditions of the invitation the bid is responsive. Thus the question of the application of regulations requiring that bids "materially conform to the specifications" of the IFB is a question of responsiveness although whether the bidder is able to perform in accordance with those specifications is a question of responsibility. In this respect the responsiveness of the PJR bid is not in issue, as there is no claim that PJR took exception to any of the terms and conditions of the IFB. The question for consideration is therefore PJR's responsibility.

GAO will not review protests against affirmative determinations of responsibility unless fraud is alleged on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been met. Edmac Associates, Inc., B-184469, January 30, 1976, 76-1 CPD 68. Thus, as this protest deals with the precise factors with which this Office is ordinarily concerned in these cases -- Allied's alleged inability to meet the definitive

responsibility criteria -- we would normally review Baranello's protest. However, where as here, a small business has originally been found not responsible because it did not meet the definitive responsibility criteria and the basis for the contracting officer's subsequent affirmative determination of responsibility rests solely on the COC issued by the SBA, there are different considerations involved, since the statutory authority of the SBA to certify the responsibility of a small business bidder is called into question.

Prior to the 1977 amendments, the Small Business Act, 15 U.S.C. § 637(b) (1976) provided that:

- "(b) It shall \* \* \* be the duty of the [Small Business] Administration and it is hereby empowered, whenever it determines such action is necessary --
- "(7) to certify to Government procurement officers \* \* \* with respect to the competency, as to capacity and credit, of any small-business concern \* \* \* to perform a specific Government contract. In any case in which a small-business concern \* \* \* has been certified by or under the authority of the Administration to be a competent Government contractor with respect to capacity and credit as to a specific contract, the officers of the Government having procurement \* \* \* powers are directed to accept such certification as conclusive, and are authorized to let such \* \* \* contract to such concern without requiring it to meet any other requirement with respect to capacity and credit."

FPR § 1-1.708-1 defines "capacity" to mean:

"the overall ability of a prospective small business contractor to meet quality, quantity and time requirements of a proposed contract and includes the ability to

perform, organization, experience, technical knowledge, skills, 'know-how', technical equipment and facilities."

We believe a reasonable reading of the FPR definition of "capacity" cannot be fairly interpreted to exclude "special conditions of responsibility." i.e., the "definitive criteria" in this case. Moreover, the 1977 amendments to the Small Business Act, *supra*, expanded SBA's authority to conclusively determine all areas of responsibility, "including, but not limited to capability, competency, capacity, credit, integrity, perseverance, and tenacity \* \* \*."

Under prior versions of the Small Business Act, we have concluded that a COC will overcome the special experience requirements specified in a solicitation. See 40 Comp. Gen. 106 (1960); B-163671, July 18, 1968. Thus we have consistently declined to review SBA determinations of responsibility absent a prima facie showing that such action was taken fraudulently or with such wilful disregard of the facts as to imply bad faith. E.g., Dyneteria, Inc., 55 Comp. Gen. 97 (1975), 75-2 CPD 36, because even if we disagreed with the SBA's determinations those judgments are conclusive on the contracting officers by law. Electro Systems Corp., B-190640, December 14, 1977, 77-2 CPD 462.

Implicit in the foregoing is the conclusive nature of the COC on GAO, because we could not recommend the agency find a small business bidder nonresponsible in the face of a COC, notwithstanding any independent conclusions we might reach in a given procurement. Thus, where no question of fraud is involved, our recommendations would be limited to suggesting that the agency request SBA to reconsider its decision if the record indicates that certain vital information bearing on a small business bidder's responsibility had not been considered by SBA. Kepner Plastic Fabricators, Inc.,

B-184394, June 1, 1976, 76-1 CPD 351. Here there is no suggestion that SBA's determination was taken fraudulently, and the record clearly indicates that SBA considered the definitive responsibility criteria fully in arriving at its determination.

In analogous situations, i.e., those dealing with the statutory authority of the Secretary of Labor to determine the applicability of the Service Contract Act (SCA), 41 U.S.C. 351 et seq. (1976), we have held that:

"[T]he Secretary of Labor has been regarded as having primary responsibility for administering and interpreting the SCA, so that to the extent there is a disagreement between DOL [Department of Labor] and the contracting agency over the application of the SCA to a particular contract \* \* \* DOL's views must prevail, 'unless they are clearly contrary to law.'" B.B. Saxon Company, 57 Comp. Gen. 501, (1978), 78-1 CPD 410.

Thus, even where we concluded that the Secretary's policy in arriving at his wage rate determinations was questionable in view of the legislative history of the SCA, we nonetheless concluded that the determination must prevail because they were not "clearly contrary to law." The Cage Company of Abilene, Inc., 57 Comp. Gen. 549 (1978), 78-1 CPD 430.

We believe the SBA's authority to issue COCs must be similarly viewed. In this respect, we are aware of no limitation on the SBA's authority which would bind that agency to the actual requirements of a Competency of Bidder's clause. Hence, in our opinion, notwithstanding the contracting officer's disagreement over SBA's application of the Competency of Bidders clause to the facts of this case, the issuance of the COC in this case must be viewed as conclusive.

Consequently, contracting agencies cannot overcome SBA's statutory authority to make these responsibility determinations as regards to small business concerns, by specifying the "special standards" or "definitive criteria" of responsibility in the invitation. See 40 Comp. Gen., supra.

As a final matter, we note that Baranello refused to extend its bid beyond its December 29, 1978, expiration date. Under these circumstances, this Office would ordinarily consider the challenge to PJR's responsibility as academic and would dismiss the protest. See Risi Industries, Inc., et al., B-191024, April 27, 1978, 78-1 CPD 329. However, rather than seek award of the contract under the IFB, Baranello "amended" its protest to request either that the requirement be readvertised, or that in the alternative, if award were to be made to PJR, "it be a condition of the award that PJR use a qualified subcontractor for elevators other than Allied."



Deputy Comptroller General  
of the United States